No. 14,995

IN THE

United States Court of Appeals

For the Ninth Circuit

MASAO HIRASUNA, doing business as Mike's Auto Top Shop & Upholstery Shop,

Appellant,

vs.

S. V. McKENNEY, District Director of Internal Revenue,

Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

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STATEMENT.

This cause was argued in early October 1956 and after a *considerable delay,* unusual in the experience of appellant's counsel in this Court, on April 12, 1957, the decision of the court below was sustained by this Court. A strong three page dissenting opinion filed by the Honorable James Alger Fee, Circuit Judge, shows that the problems presented by the case, were not without merit nor without difficulty.

This test case presented, though it involves a bare $1,391.92, a very important nation-wide question to the automobile repair industry. Appellant's attorney received numerous inquiries from attorneys in other mainland cities confronted with the same problem and, though this case involves a small figure, the nation-wide effect will involve a large sum.

Appellant hereby requests a rehearing, not only for the reasons hereinafter specifically stated but because of the strong dissenting opinion filed in this cause and contrary opinions of federal district courts in other jurisdictions rendered after this case was submitted on October 3, 1956. Appellant's attention to these other district court decisions, was called after the receipt of the decision in this cause.

Under Rule 23 of this Court, if a rehearing is granted, it is suggested that the case be reheard en banc because of the nation-wide importance of this case. These upholsterers are small businessmen and an 8% tax on the gross out of their own pockets is an all important question to them. Time spent listening to tax inequities voiced by small businessmen is time well spent.

QUESTIONS PRESENTED.

(1) The record showed that appellant in the Court below tried to show "inaction" by the tax collectors in Hawaii but he was prevented in the trial Court. This error of the trial Court cannot be ignored.

(2) That *United States v. Keeton,* 238 F.2d 878, is not a case in point because the dispute in said case was for taxes after August 18, 1952, the date of the public ruling. The present case covered a period before.

(3) That two new decisions by federal district courts on the question since October 3, 1956, have been in appellant's favor.

(4) The decision of Circuit Judge Hamley will broaden this field of taxation to subjects beyond the comprehension of Congress. Auto painting, auto greasing and auto polishing will hereafter be the sale of auto parts.

ARGUMENT.

(1) It is submitted that the dissenting opinion by Circuit Judge James Alger Fee wherein he stated:

> "The main opinion is erroneous because it apparently decides that the construction of the statute and regulations which is there adopted in 1957 would override a consistent long standing administrative interpretation by the federal agency itself.
>
> This statute and the applicable regulations are not so plain in the commands thereof to leave nothing for construction. Indeed, these were construed contrary to our present interpretation in 1926 by the opinion in John J. Roche Co. v. Eaton, 9 Cir., 14 F.2d 857. This theory was affirmed and adopted by a District Court in 1954 in Johnnie & Mack, Inc. v. United States, 123 F. Supp. 400.

> The main opinion here resolves the matter as if the case were of first impression. So does the decision in United States v. Keeton, 4 Cir., 238 F.2d 878. But in the instant case the point was squarely raised *that the agency had acquiesced in the construction of the statute in the Roche case for a period of over twenty-five years and, as a result, had left untaxed installers of seat covers on automobiles.* It was also contended that this course of action was summarily reversed after the bulletin of August, 1952, by the indentical agency. It may be agreed that the evidence was insufficient in the instant case. But the exact contention has been raised in other cases, notably, Martin v. Andrews, 9 Cir., 238 F.2d 552, where we held that the suit was premature and where the merits were not considered. *We should not bind all of the judges of this Court to our present interpretation in other causes where more evidence of contrary administrative practice might conceivably be.*" (Emphasis Supplied.)

is correct. In the trial below appellant tried to bring the necessary evidence of "inaction" but he was stopped. The transcript at pages 85-86 shows that with relation to questions to witness Clyde Lee, Revenue Agent, the following:

> "Q. You yourself made several assessments?
>
> A. I have made some assessments besides this one.
>
> Q. That is not hearsay; you know that of your own knowledge?
>
> A. That is right.
>
> Q. And in all of those cases there were no returns filed in the respective years?

> Mr. Dwight. Objections, your Honor. This line of questioning has gotten off to immaterial facts as to what happened in other cases.
>
> The Court. Sustained."

Circuit Judge Hamley stated as follows at page 10 of the decision:

> "We do not have before us the question of whether private, as distinguished from public, rulings amounted to an administrative construction of the act, for no evidence as to any such private rulings is to be found in this record. *Nor is there here a showing as to general inaction by the bureau with regard to the assessment of such transactions sufficient to present a question of administrative construction."* (Emphasis ours.)

Appellant tried to show said "inaction" in the Court below but as above indicated he was stopped in the court below but in the Court of Appeals he is told that he should have gone ahead and proved it. *Appellant, a small businessman, surely cannot be made to understand that justice operates in this abrupt manner.*

The "inaction" is furthermore apparent by the crop of cases which have been recently adjudicated in the various federal district courts. Cases heretofore cited in the opening brief and new cases cited in this brief clearly show what the administrative practice has been. See especially record in *Martin v. Andrews,* 9 Cir., 238 F.2d 552, decided by this Court on or about April 1957 (Case No. 14995) which conclusively shows "inaction" in the Los Angeles area of Cali-

fornia. Appellee in his answering brief admits the Commissioner's mistake by arguing that the *"Commissioner is not bound by his own or his predecessor's prior mistakes of law."* (Ans. Br. 26-29.)

If Appellant were allowed production of such evidence in the Court below, it would clearly have shown that the administrative "inaction" in Hawaii was uniform with the facts showing "inaction" in the present case.

It is respectfully submitted that *United States v. Leslie Salt Co.,* 350 U. S. 383, quoted in the dissenting opinion must be given the highest respect because the said case originated from this 9th Judicial Circuit and this court was sustained by the Supreme Court in strong language far in excess of what this Court decided. See 218 F.2d 91 for this Court's opinion in said case.

(2) *United States v. Keeton,* 238 F.2d 878, relied upon by Circuit Judge Hamley of this Court, at page 4 of his opinion, is not exactly in point because the *Keeton* suit expressly involved excise taxes due "on and after August 18, 1952." The public ruling quoted at page 8 of the decision of Circuit Judge Hamley became effective on August 18, 1952.

Appellant in this case takes issue of the taxes assessed against him *before August 18, 1952,* when everyone in the business was without the benefit of the ruling of August 18, 1952. It is submitted that this is a material difference, in that the practical effect is that appellant is forced to pay his taxes out of his pocket.

It is submitted that there is no reported case which disallowed recovery for assessments made for the same taxes before August 18, 1952. See *John J. Roche Co. v. Eaton,* 14 F.2d 857, *Johnnie & Mack Inc. v. U. S.,* 123 F.Supp. 400 (S. D. Fla).

(3) After the submission of this case for argument on or about October 3, 1956, two federal district courts have agreed with appellant. In *Johnnie & Mack Inc., v. U. S.* (U. S. Dist. Court, S. Dist. of Fla. No. 6621-M, January 30, 1957) the court held as follows:

> "1. Sales of seat covers in the instant case are sales of labor and material and not sales of seat covers as accessories.
>
> "2. It was not the intent and purpose of Congress to classify the Plaintiff as a manufacturer and *as further evidenced by the ruling of the Internal Revenue Bureau which was in effect for seventeen (17) years from 1953 (ST824, CB December 1935, page 368).* (Emphasis ours).
>
> "3. On the 16th day of June, 1954, before the Hon. John W. Holland presiding, this Court in a case involving the same parties and the same facts as the instant case, the Court found that the Plaintiff's sales of seat covers were sales of labor and material and not sales of seat covers as accessories, and after having heard the testimony in this case, I find no valid reason for disturbing this ruling."

The effect of ST824 above referred, was argued on page 19, appellant's opening brief. Said public ruling of 17 years read as follows:

> "Prentice Hall, Fed. Tax Service Vol. 3-8, Paragraph 38,571.

"Taxability of sale or use of parts or accessories measured and cut from raw or bulk material.—* * * A jobber or dealer frequently buys material, not subject to tax, and *by cutting or processing the material to the required length or size produces a part or accessory. In deciding whether the transaction is taxable, the Bureau has drawn a distinction between an immediate repair job and a sale for future use. If the part or accessory is cut or produced from lengths of rolls of material for immediate use by a repairman in a repair job on which he is then working, the sale thereof by the jobber or dealer to the repairman is deemed to be a sale of material not subject to tax.* If, however, the jobber or dealer transforms lengths or rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes the manufacturer of such articles within the meaning of the Act, and his subsequent sale or use thereof is taxable under section 606 (c) of the Revenue Act of 1932. (S.T. 824, CB. Dec. 1935, p. 368.)" (Emphasis ours).

It is in plain language and the Florida district Court was absolutely correct.

In *Lee R. Brown v. Ellis Campbell, Jr., District Director* (U. S. District Court, N. Dist. of Texas, Dallas Div. No. 6486, Oct. 24, 1956) the Court held as follows:

"Now, further back it is agreed that, 'During the tax years in question plaintiff owned and operated a proprietorship in Dallas, Texas known as Brown's Top & Seat Cover Company. Plaintiff did not carry any stock or ready made seat covers. Plaintiff carried a varied stock of ma-

terials which he purchased from manufacturers and wholesalers in large quantities and in various types, qualities and colors. These materials came in rolls or bolts. The customer would choose his desired materials from the stock and plaintiff would remove the seats and back rests and place them on tables where he would measure the material to the seats and back rests of the customer's car, making the material, then removing the material and cutting it to fit.

"In instances where the seats or back rests could not be removed he would place the material on the seats or back rests of the customer's car, marking same, and remove it to be cut.

"The several pieces are then sewed together and a decorative piping sewed at the seams. The materials so sewed together are then fastened to the seats and back rests of the automobile.

"The price to the customer is fixed by the price of the material plus labor and overhead costs and profit.

"The aforesaid business, as conducted by plaintiff, is commonly referred to and known as a 'custom-made seat cover business.'

"Now, the statute is that there is hereby levied and imposed upon parts or automobile accessories, and for any other article enumerated in subsection 'A' sold by manufacturers, producers or importers, a tax equivalent to eight per cent.

"I feel that the tax as levied by the wording of the statute *does not cover what we might call tailors engaged in the manufacture of seat covers.* He doesn't have any stock, he is not classed as a manufacturer, he is a tailor and makes a garment to suit you. This man makes a seat cover for you. To cover him I think the statute would have to

be explicit and it is not the purpose of the Court to extend the statute. (emphasis ours).

"I don't believe the statute covers it, so, the plaintiff would be entitled to recover."

The writer of this brief has requested West Publishing for citations of said cases but to date he has not received a reply. Both of the above cases are reported in "Prentice-Hall," Federal Taxes (Permanent Volume) Vol. 3-A at pages 44,481-44,483.

It is respectfully submitted that both decisions are based on arguments submitted by appellant in his opening brief.

(4) The decision of Circuit Judge Hamley will necessarily have far-reaching results never contemplated by Congress. In the oral argument before the Court, counsel for appellant submitted that if the government's point of view is accepted, auto painting will be a sale of auto parts because the paint "improves" the vehicle; it is "attached" to the vehicle "to add to its utility or ornamentation" and its use is in "connection with such vehicle." See definition of "parts or accessories," appendix herein, and at bottom of page 3 of Circuit Judge Hamley's opinion. And manufacturing takes place when "combining or assembling two or more articles." See appendix for regulation defining "manufacturing." The present case involves covering seats with a solidified plastic or related material using thread and hog rings, painting involves "combining" of component parts of paint and covering the car with non-solid plastic or related material. Both attach to the car. Both require "processing, manipulating or changing of the form of the article." If the decision of Circuit Judge Hamley is

taken on its face, appellant sees no avenue of escape for the auto painters, another group of small businessmen. Will they also suffer the retroactive reaches of a statute and regulation of "broad command"? There must be a limitation. The decision by Circuit Judge Hamley apparently nullifies the provision "commonly or commercially" known as a part or accessory. Appellant strenuously argued that the evidence was uncontradicted that the article made by appellant prior to installation had no other use than to cover the seats it was specially made for and therefore was not an auto part. Appellant's opening brief pp. 45-48.

It is submitted that if Circuit Judge Hamley's decision is allowed to stand "auto painting" will be a sale of parts. Even "greasing" will come within the meaning of the decision. Polishing, as well, perhaps.

Congress certainly didn't intend any such interpretation.

In accordance with the rules of this Court, regulations referred to herein, are hereinafter recited in the appendix.

Dated, Honolulu, T. H.
May 1, 1957.

Respectfully submitted,
SHIRO KASHIWA,
Attorney for Appellant and Petitioner.

On The Brief:
GENRO KASHIWA.

Certificate

I, Shiro Kashiwa, an attorney for appellant, certify that the foregoing petition for rehearing is in my judgment well founded, and is not interposed for delay.

Dated, Honolulu, T. H.
May 1, 1957.

Shiro Kashiwa.

(Appendix Follows.)

Appendix.

Appendix

Treasury Regulations 46

"Sec. 316.4 Who is a Manufacturer.—The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

"Sec. 316.55 Definition of Parts or Accessories.

"(a) The term 'parts or accessories' for an automobile truck or other automobile chasis or body, taxable tractor, or motorcycle, includes (1) any article the primary use of which is to *improve,* repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be *attached* to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in *connection* with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, or automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts of accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see §316.140.

"(b) The term 'Parts and accessories' shall be understood to embrace all such articles *as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles."* (Emphasis ours.)